In the Supren

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GREGOR

UNIT

ON PETITION F
UNITED
FO

BRIEF FOR THE

Whether petitioner waived his Sixth
right to counsel during post-indictment

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OCTOBER TERM, 1990

No. 89-1856

GREGORY SCARPA, JR., PETIT

v.

UNITED STATES OF AMER

ON PETITION FOR A WRIT OF CERTIO
UNITED STATES COURT OF AP
FOR THE SECOND CIRCU

BRIEF FOR THE UNITED STATES I

OPINIONS BELOW

The opinion of the court of appeal
14a) is reported at 897 F.2d 63. Th
district court (Pet. App. 1b-15b) is
F. Supp. 379.

JURISDICTION

The judgment of the court of app
on February 23, 1990. The petitio
certiorari was filed on May 24, 1990.
of this Court is invoked under 28 U

enterprise, in violation of 18 U.S.C. 1
ing in a continuing criminal enterpri
of 21 U.S.C. 848(a) (1982 & Supp.
spiring to distribute marijuana, in
U.S.C. 846 (1982); distributing mar
lation of 21 U.S.C. 841(a)(1); and
commit extortion and committing exte
tion of 18 U.S.C. 1951. He was sent
of 20 years' imprisonment on the ra
tinuing criminal enterprise, extortion
conspiracy counts, and 5 years' impri
marijuana conspiracy and marijua
counts. All of the prison terms were

1. An indictment returned in
charged petitioner and eight co-de
crimes committed as part of a mari
tion operation headed by petitioner.
defendants were tried jointly and co
ious narcotics and extortion offenses.
the jurisdiction, however, and rema
until he was arrested by Drug Enfor
istration agents at a motel in Lakewo
on August 29, 1988. Pet. App. 3a.

Upon petitioner's arrest, DEA Spe
Gilbride advised petitioner of his M
Petitioner interrupted the agent, sta
stand my rights, you don't have to
Gilbride completed the *Miranda* warn

without any further questioning.

The following day, Agent Gilbr
United States Marshal drove pe
Lakewood jail to the federal court
New Jersey, where he was arraign
fore or during that trip, Joseph B
who had been retained by petitione
that morning, telephoned the Uni
ney's office in Camden. The Assist
Attorney with whom Benfante sp
that petitioner would not be questi
titioner nor the officers who transp
Camden were aware that Benfante
to represent petitioner or that B
tacted the U.S. Attorney's office. P

During the two-hour drive from
den, petitioner and Agent Gilbrid
petitioner's experiences as a fugit
of petitioner's co-defendants. Dur
tion, petitioner repeatedly asked G
who had revealed his whereabouts
fused. Gilbride asked petitioner w
his friends were angry with him
to trial while he was a fugitive. Pe
that his friends were not "like th
were "good guys." He mentioned
defendants had visited him while

informed during the trial. At no
conversation with Gilbride did petit
attorney or indicate in any way that
to talk. Pet. App. 7a-8a.

Prior to trial, petitioner moved
post-arrest statements to Agent
ground that they had been elicited i
Sixth Amendment right to counsel.
denied the motion, holding that the
"more than amply sustained its bur
ing that [petitioner] knowingly
waived his Sixth Amendment rights.
14b. The court ruled that petitioner
he "was going to get a lawyer" was
counsel and that the attempted in
attorney retained by petitioner's fa
knowledge did not invalidate petiti
his right to counsel. *Id.* at 5b-14b.
court concluded that petitioner's S
rights had not been violated.[1]

2. The court of appeals affirmed
14a. In considering whether petiti
his right to have counsel present dur
ing by Agent Gilbride, the court not
had been informed of his *Miranda* ri
indicated that he understood them
was "no suggestion of intimidation

lawyers to represent his underlin
operation, and could easily have
himself before his arrest, he had
do so. The court concluded that p
to speak to Agent Gilbride on
"was confident in his own abilit
enforcement officers and * * * th
suade Gilbride to reveal who ha
Accordingly, the court held that
ingly and intelligently waived his
ance of counsel during the q
10a-11a.

The court also rejected petitio
communication between the law
family and the United States
quired suppression of his subse
Agent Gilbride. Noting that there
that [petitioner] doubted his abi
government agents on his own,"
that the intervention of an attorn
petitioner's knowledge could not
er's waiver of his right to coun
13a.

ARGUMENT

Petitioner renews his contention (Pet. his statements to Agent Gilbride should suppressed because they were elicited in petitioner's Sixth Amendment rights.

The Sixth Amendment guarantees crim ants the right to the assistance of cou post-indictment questioning by law enfo thorities. *Michigan* v. *Jackson*, 475 U.S 630 (1986); *Brewer* v. *Williams*, 430 U (1977); *Massiah* v. *United States*, 377 U 207 (1964). Nothing in the Sixth Amen ever, "prevents a suspect charged with represented by counsel from voluntarily his own, to speak with police in the ab attorney." *Michigan* v. *Harvey*, 110 S 1181 (1990); see *Patterson* v. *Illinois*, 4 291 (1988). Here, the court of appeals trict court agreed that petitioner made and deliberate choice to relinquish his S ment rights and to speak with Agent G his arrest.

Petitioner first contends (Pet. 9-11 waiver was invalid because the police manipulation and slick interrogation te elicit information from him. The facts, h

Petitioner next contends (Pet. 11-13) t
tempted intervention of the attorney that
family retained on his behalf invalidated
waiver of his right to counsel during his c
with Agent Gilbride.[3] Petitioner argues
that the "intervention of any counsel ass
he represents the accused mandates the c
all interrogaton activity" and that "any
waiver of counsel may occur only after t
has had an opportunity to consult with th
This Court's decisions, however, do not su
argument.

The Court held in *Moran* v. *Burbine*,
statements made by an unindicted susp
sponse to police questioning were properly
even though an attorney retained by th
family without his knowledge had contac
lice and been assured that the suspect wo
questioned. 475 U.S. at 421-424. As in th
suspect had been advised of his *Miranda*
had not requested counsel. *Id.* at 415.
concluded that the attorney's attempt to i
the suspect's behalf did not invalidate th
subsequent waiver of his *Miranda* rights,
that "[e]vents occurring outside of the
the suspect and entirely unknown to him

have no bearing on the capacity to con
knowingly relinquish a constitutional r
422.

Two years later, the Court held in
Illinois, *supra*, that an indicted defen
of his *Miranda* rights also served to wa
Amendment right to the assistance of c
police questioning. 487 U.S. at 296-29
expressly rejected the "notion that bec
Amendment right may be involved, it
cult to waive than the Fifth Amendm
part." *Id.* at 297-298. Instead, the C
a "more pragmatic approach to the wai
focusing on "what purposes a lawyer ca
particular stage of the proceedings in c
to determine the scope of the Sixth Am
to counsel and the type of warnings a
that should be required before a waiver
will be recognized." *Ibid.* Because the
during both pre-indictment and post-ind
tioning is "largely limited to advising
to what questions to answer and whic
cline to answer," *id.* at 294 n.6, the Co
that a suspect's valid waiver of his *M*
was also sufficient to waive his Sixth

sought the assistance of counsel.[4] Bu
of appeals noted, "it does not follow u
fifth or sixth amendments that an att
to the defendant may invoke the def
and thereby prevent the defendant
them." Pet. App. 12a. Instead, the
self must exercise those rights by req
ing, or accepting appointment of a la
terson v. *Illinois*, 487 U.S. at 290 n.3
a matter of some significance that pet
retained, or accepted by appointmen
represent him at the time he was qu
thorities."); *Moran* v. *Burbine*, 475 U
("the crucial distinguishing feature o
that Burbine at no point requested t
counsel").[5]

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[4] In *Moran*, the Court rejected the defenda
ment claim because the questioning that
lenged statements occurred before the "fo
adversary judicial proceedings," 475 U.S. a
that "once the [Sixth Amendment] right *ha*
lows that the police may not interfere wit
defendant's attorney to act as a 'medium
pect] and the State' during the interroga
(quoting *Maine* v. *Moulton*, 474 U.S. 159,

Like the defendants in *Moran* and
tioner did not invoke his Sixth Amen
counsel prior to police questioning. H
tempt to contact or retain an attorney
rest, even though he was aware of the
had been a fugitive for months. After
and advised of his *Miranda* rights, pe
request a lawyer. Instead, he deliber
speak to Agent Gilbride, knowingly a
waiving his Sixth Amendment right to

Petitioner also urges this Court
adopt a "bright-line rule" that a waiv
Amendment right to counsel will be f
there is "an express, affirmative w
right by the accused. This Court, h
fused to require an express waiver
Amendment right to counsel guarante

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out counsel is a personal right that can b
the defendant himself. As the Court expla

> Preserving the integrity of an accuse
> municate with police only through cou
> of *Edwards* [v. *Arizona*, 451 U.S. 47
> progeny—not barring an accused from
> election as to whether he will face
> during questioning with the aid of cou
> If an accused "knowingly and intellig
> latter course, we see no reason why the

See *North Carolina* v. *Butler*, 441 U
(1979). In rejecting an "inflexible r
plicit waiver can ever suffice," *id.* at
noted that "[e]ven when a right so
that to counsel at trial is involved,
waiver must be determined on 'the
and circumstances surrounding that
the background, experience, and con
cused.'" *Id.* at 374-375 (quoting *Joh*
304 U.S. 458, 464 (1938)). Petitio
that the Court should adopt a more
ard for the waiver of Sixth Amendm
it has for the waiver of Fifth Amend
squarely rejected in *Patterson*:

> While our cases have recognized
> between the Fifth Amendme
> Amendment rights to counsel, ar
> behind these constitutional guar
> never suggested that one right i
> "greater" than the other, nor is
> port in our cases for the notion
> Sixth Amendment right may be
> more difficult to waive than the
> ment counterpart.

487 U.S. at 297-298.

CONCLUSION